U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 28 2000

IN RE: Petitioner:
Beneficiary: [redacted]

Public Copy

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, an import and export business, seeks to employ the beneficiary as its vice president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, the petitioner submits a statement and additional evidence.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

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8 CFR 204.5(j)(3) states:

> (i) *Required evidence.* A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
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> (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
>
> (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
>
> (D) The prospective United States employer has been doing business for at least one year.

At issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

8 CFR 204.5(j)(5) states:

> *Offer of employment.* No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
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> (i) manages the organization, or a department, subdivision, function, or component of the organization;

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(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In his decision, the director noted that the petitioner had not established that the U.S. entity had expanded to the point where the services of a full-time bona fide vice president would be required. The director further noted that the beneficiary would be primarily performing the U.S. entity's day-to-day operational duties.

On appeal, counsel argues that the beneficiary is a function manager and further states in part that:

To the extent that staffing levels are a factor in deciding whether the applicant is a manager or executive, the Service

must take into account the reasonable needs of the organization, component, or function involved, according to its stage of development and particularly in the South Florida area where most export companies are very small in personnel but highly productive in their growth and exports through the use of brokers and intermediaries.

Therefore, a department head could be approved at the start-up stage when it is too early to have hired a professional staff or tiered levels of employees. This "new office" concept is currently recognized in the Service's L-1 regulations, and they should provide leeway for the petitions on a case by case basis.

The record reflects that the U.S. entity was incorporated on August 19, 1994, and the present petition was filed on February 19, 1998. The record further reflects that the U.S. entity has the following four employees/positions: a general manager; a supervisor; a purchasing agent; and a secretary. The U.S. entity's corporate tax return for the period from August 1, 1996 through July 31, 1997, reflects $1,428,410 in gross receipts or sales; $0 in compensation of officers; and $19,615 in salaries and wages. The U.S. entity's corporate tax return for the period from August 1, 1997 through July 31, 1998, reflects $825,143 in gross receipts or sales; $0 in compensation of officers; and $0 in salaries and wages. As the U.S. entity's most recent corporate tax return reflects no monies paid for compensation of officers or salaries and wages, the evidence does not establish that the U.S. entity contains the organizational complexity to support an executive position. It is further noted that although counsel argues that a department head could be approved at the start-up phase of the company when it is too early to have hired a professional staff, the record reflects that at the time of the filing of the present petition, the U.S. entity had been established for more than three years and was well outside of its first-year start up phase. Service regulations require a new office to demonstrate viability after the initial one-year period.

When seeking classification of an alien as a manager based on managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing nonqualifying duties. Evidence in the record is not persuasive that the U.S. entity has the organizational complexity to support an executive position for the reasons discussed above. As such, the record does not persuasively demonstrate that the beneficiary will function at a

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senior level within an organizational hierarchy, or with respect to a function. Consequently, the petitioner has not sufficiently demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner did not submit evidence to establish that the beneficiary had been previously employed outside the United States for at least one year in a managerial or executive capacity. Further, the record is not persuasive in demonstrating that the petitioner has the ability to pay the salary offered. 8 CFR 204.5(g)(2) states that the petitioner shall submit evidence of the ability to pay the wage offered in the form of copies of annual reports, federal tax returns, or audited financial statements. As the petitioner's most recent corporate tax return reflects that it paid no monies in compensation of officers or salaries and wages, the petitioner has not sufficiently demonstrated that it has the ability to pay the salary offered to the beneficiary.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.